IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1515

THE LONG ISLAND RAIL ROAD COMPANY,

*Petitioner,*

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, *et al.*, CHESSIE SYSTEM LINES, SOUTHEASTERN ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, SOUTHERN GOVERNORS' CONFERENCE, THE UNITED STATES OF AMERICA, and THE INTERSTATE COMMERCE COMMISSION,

*Respondents.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

## BRIEF IN OPPOSITION FOR RESPONDENTS ABERDEEN & ROCKFISH RAILROAD COMPANY, *et al.*

HOWARD J. TRIENENS
R. EDEN MARTIN
LAWRENCE A. MILLER
One First National Plaza
Chicago, Illinois 60603

*Attorneys for Respondents Aberdeen & Rockfish Railroad Company, et al.*

SIDLEY & AUSTIN
*Of Counsel*

May 24, 1978

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

### Cases

**Statutes**

**Legislative History**



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-1515**

THE LONG ISLAND RAIL ROAD COMPANY,

*Petitioner,*

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, *et al.*, CHESSIE SYSTEM LINES, SOUTHEASTERN ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, SOUTHERN GOVERNORS' CONFERENCE, THE UNITED STATES OF AMERICA, and THE INTERSTATE COMMERCE COMMISSION,

*Respondents.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

## BRIEF IN OPPOSITION FOR RESPONDENTS ABERDEEN & ROCKFISH RAILROAD COMPANY, *et al.*

### QUESTIONS PRESENTED

1. Whether the Court of Appeals below erred in holding that the Interstate Commerce Commission failed to give a "reasoned explanation" (App. A, 12a)[1] of its order approving

[1] References herein to the decision of the Court of Appeals, reported at 565 F.2d 327 (5th Cir. 1977), and the decision of the Commission, reported at 350 I.C.C. 673 (1975), are to the Appendices accompanying the Petition for Writ of Certiorari.

a "terminal surcharge" of 12.5 percent for The Long Island Rail Road Company ("Long Island") as a final rate increase to offset increased retirement tax costs under Section 15a(4)(c) of the Interstate Commerce Act (49 U.S.C. §15(4)(c)) (App. G, 11g)[2] in light of the statutory requirement of consistency with the "standards and limitations applicable to ratemaking generally"?

2. Whether the Court of Appeals erred in holding, as a separate ground for setting aside the Commission's order, that the Commission's order changed the applicable divisions of joint rates without the findings required by Section 15(6) of the Interstate Commerce Act (49 U.S.C. §15(6)) (App. G, 14g) to support such a change (App. A, 15a)?

3. Whether the Court of Appeals erred in imposing a trust fund on surcharge revenues which Long Island has been permitted to collect pending remand to the Commission as an equitable alternative to simply setting aside the terminal surcharge found by the Court to have been unlawfully approved?

## STATEMENT

The Long Island's arguments, even if they had merit, would not warrant grant of certiorari under the standards established by this Court (Rule 19) because there is no conflict among the circuits and no issue of general importance presented by the unique and non-recurring facts of this case. The lack of importance of the issue is manifest from the Commission's own election not to petition for certiorari. (The United States, also a statutory respondent below, declined to defend the Commission's order in the Court of Appeals and has not petitioned for certiorari in this Court.)

---

[2]Section 15a(4) was redesignated as Section 15a(6) by Pub.L.94-210, Title II, §205, 90 Stat. 41. All references herein, however, in order to be consistent with the usage of the Commission and the Court of Appeals, shall be to Section 15a(4).



Moreover, the Long Island's arguments are without merit, as can best be demonstrated by setting forth in adequate detail the unique facts of the Long Island's situation as they bear upon the non-recurring issues of interpretation of the Railroad Retirement Amendments of 1973 and the findings required under those Amendments.

## Background Facts

Long Island is a commuter railroad whose principal business is transporting commuters between New York City and their residences on Long Island. It is owned and operated as a subsidiary of the New York Metropolitan Transportation Authority ("MTA"), an agency of the State of New York. It also has a small amount of freight business, which accounts for less than 10 percent of its revenues (App. B, 51b).

The traffic involved in this case is freight traffic which moves over Long Island and also over one or more of Railroad Respondents. The railroads which participate in such a haul collect a rate from the shipper for that joint service; each railroad then receives a share, or "division," of that rate. These divisions may be agreed upon, or prescribed by the Commission under Section 15(6) of the Act (49 U.S.C. §15(6)) (App. G, 14g).

The divisions which apply to rates on traffic in which Long Island and Railroad Respondents participate are a combination of agreed and prescribed divisions. To illustrate, consider a shipment of freight moving from the South via Southern railroads 800 miles from the origin to Cincinnati, Ohio—thence via Northern railroads 780 miles to an interchange with Long Island—thence 20 miles to destination on Long Island. The revenue is first divided according to "primary divisions," which determine the share (or "primary

division") of all the railroads performing service in the South, and the share of all the railroads performing service in the North. The primary divisions which apply today are "equal factor" divisions prescribed by the Commission.[3] Applying this equal factor divisional basis, each group of railroads would receive the same compensation for the same amount of service. Thus, in the above example, the Southern railroads would receive a "primary division" of 50 percent of the rate paid by the shipper for their 800 miles of service, and the Northern railroads would likewise receive 50 percent for their 800 miles of service. The Southern railroads would then subdivide their primary division (i.e. their 50 percent) among themselves, and the Northern railroads (including Long Island) would do the same.

Long Island's subdivision of the primary division received by the Northern railroads has been prescribed by the Commission. *Long Island R.R. Co.* v. *Ahnapee and Western Ry. Co.*, Docket No. 35153 (Order of Division 2, dated April 13, 1973). Long Island's subdivision varies depending upon the origin and destination of the traffic, but its average share of the total rate is 16 percent (App. A, 9a). Thus, if the total freight charge were $1,000 on a shipment moving 800 miles in the South and 800 miles in the North (including 20 miles

[3]The Commission prescribed these equal factor divisions on North-South traffic in *Official-Southern Divisions*, 287 I.C.C. 497 (1953). Efforts by the Northern railroads to obtain disproportionately higher primary divisions have been unsuccessful. *Aberdeen & Rockfish R. Co.* v. *United States*, 270 F.Supp. 695 (E.D.La. 1967), *aff'd, Baltimore & O. R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87 (1968).

Freight traffic between the North and the Southwest is subject to equal-factor divisions identical to the North-South divisions. *Official-Southwestern Divisions*, 287 I.C.C. 553 (1953). The divisions on freight traffic between the North and other areas of the West are determined by agreements between the Northern and Western railroads.



via Long Island), then the Southern and Northern railroads would each receive $500 as their primary division; and Long Island would receive $160 out of the Northern primary division (16 percent of the total rate) as its compensation for its 20 miles (2 percent of 1000 miles) of the total service.

## Long Island's Terminal Surcharge

Following the enactment of the Railroad Retirement Amendments of 1973, the railroads undertook to increase their rates to offset their increased retirement taxes. The railroads generally (but not Long Island) sought and received permission to implement a general rate increase of 2 percent (effective October 1, 1973) and an additional increase of 2.7 percent (effective January 1, 1974). Long Island declined to join in the general increase, which did not, therefore, apply to traffic to or from Long Island.[4] Instead, Long Island filed a tariff providing for a "terminal surcharge" to be applied to freight traffic and to accrue solely to Long Island. The "terminal surcharge" originally sought by Long Island was 3.5 percent of the freight charges otherwise applicable, and was later increased to 12.5 percent (App. B, 44b–46b).

Because approximately 90 percent of Long Island's service is commuter service and only 10 percent is freight service, most of Long Island's employees have nothing to do with providing freight service. But instead of raising commuter fares or attempting to obtain increased assistance

[4]Beginning in 1969, Long Island declined to participate with the rest of the railroad industry in general rate increases. In the absence of its consent, the joint rates could not be increased to or from Long Island, and all carriers were deprived of the increased revenues on traffic to or from points on Long Island. The Commission found that Long Island's "motivation is clearly to put pressure on the connecting carriers to renegotiate their present divisions agreements." *Declaratory Order—Rule 52 of Traffic Circular No. 20*, 337 I.C.C. 274, 286 (1970).

from its owner, the State of New York, Long Island sought through its 12.5 percent surcharge to recover from freight rates its entire increased retirement taxes—*including* the 90 percent attributable to commuter employees.

Long Island's refusal to concur in the general rate increase sought by other railroads, together with its filing of a tariff providing for a 12.5 percent terminal surcharge to be retained entirely by Long Island, had the following consequences:

(1) It prevented the other carriers from recovering *any part* of their increased retirement tax costs on traffic to or from Long Island.

(2) Although the total rate (including the 12.5 percent terminal surcharge) paid by freight shippers in movements to and from points on Long Island was the same as the rate paid to adjacent points in New York in which Long Island was not involved,[5] Long Island's share of that total rate was

[5]As a result of Long Island's refusal to participate in general rate increases in 1969 and thereafter, rates to and from points on Long Island were lower than those to and from adjacent points in New York. Following the Commission's decision granting Long Island permission to collect the 12.5 percent terminal surcharge, Long Island consented to application of the previously-authorized general revenue increases to freight traffic in which it participates (except for the Ex Parte No. 299 increase of 2.8 percent, and the Ex Parte No. 305 increase of 10 percent) which taken together with the application of the 12.5 percent terminal surcharge, approximately equalized the level of freight charges on an interstate shipment to or from a station on Long Island and the level of freight charges to or from adjacent points in New York not served by Long Island.

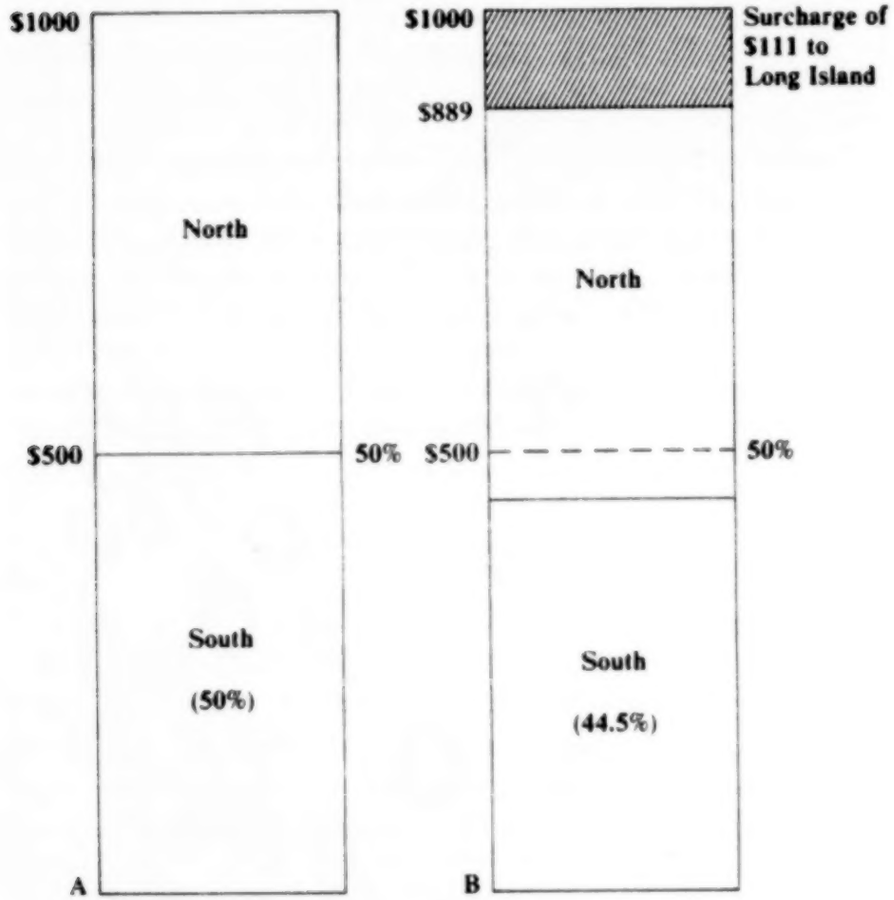
The Commission has *not* permitted the total freight charges on traffic to Long Island to exceed the level of total charges to adjacent points in New York. *Sunkist Growers, Inc.* v. *Akron, Canton & Youngstown R. Co.*, Docket No. 35960 (Order dated July 29, 1976), *appeal pending, Atchison, T. & S. F. Ry. Co.* v. *ICC* (5th Cir. No. 77-1946).



dramatically increased. Prior to imposition of the surcharge, Long Island received an average of 16 percent of the revenue for its share of the service (*supra*, p. 4). After the surcharge was imposed, however, Long Island's share of the revenue was increased substantially and the revenue shares of other railroads were correspondingly reduced, although there was no change in the services performed. For example, if the total rate for a 1,600 mile movement were $1,000 (of which $111 consisted of the terminal surcharge on top of the underlying rate of $889), Long Island would receive $253—or 25 percent of the total revenue—for its 2 percent of the haul. Long Island would receive the $111 terminal surcharge and, in addition, 16 percent of what was left (.16 x $889 = $142), for a total of $253 (i.e. 25 percent).

Prior to the imposition of Long Island's terminal surcharge, the Southern railroads received 50 percent of the revenue for their 50 percent of the service. After the surcharge was imposed, however, they received only 44.5 percent of the revenue ([$1,000 – 111] x .50 = $445), although the service of the Southern railroads remained the same. The revenue shares of other lines participating in movements with Long Island, such as the Western railroads, were likewise reduced.

This result may be demonstrated graphically as follows:




Where the freight charge is $1000 and there is no terminal surcharge, the Southern railroads receive their prescribed division of 50 percent, or $500 (Graph A). Where part of the revenue is labelled a "terminal surcharge" and given entirely to Long Island (i.e. $111—or .125 x $889), then the remainder (i.e. $889) is divided among the other participating railroads, and the Southern railroads receive $444, which is only 44.5% of the total freight charge (Graph B).

(3) The impact of Long Island's commuter costs imposed on freight operations by means of the terminal surcharge was greatest as to shipments originating at points



located farthest from Long Island. Because Long Island's terminal surcharge is taken as a percentage of the entire joint rate, the amount received by Long Island increases as to the longer hauls even though Long Island's service remains the same, and even though its proportion of service to the total service is much less.[6]

**Proceedings Before the Commission**

Subparagraph (4)(b) of the 1973 Railroad Retirement Tax Amendments to Section 15a of the Interstate Commerce Act directed the Commission to permit "interim" increases within thirty days of the filing of a petition seeking an increase. In order to prevent any Commission suspension or other regulatory delay, the Commission was directed to allow the railroads to implement interim increases under paragraph (4)(b) "[n]otwithstanding any other provision of law."

Subparagraph (4)(c) of amended Section 15a directed the Commission to hold hearings and make a final determination as to the proposed increases. In contrast with the provisions of subparagraph 4(b) authorizing interim increases "[n]otwithstanding any other provision of law," subparagraph 4(c) provided that in making its final determination as to proposed rates, the Commission "shall determine such final rates under the standards and limitations applicable to ratemaking generally."

Acting under Subparagraph (4)(b), the Commission held that Long Island's proposed "terminal surcharge" was not

[6]Thus, on a 3,000 mile freight shipment to or from Long Island where the total rate is $3,000 (joint rate of $2,667 and terminal surcharge of $333), Long Island would receive its terminal surcharge of 12.5 percent ($333) and also its regular division of the remaining revenue of $2,667. Long Island's surcharge in this instance would be 3 times as large as the surcharge received when the total rate was only $1000—even though Long Island has performed the very same work, and a smaller percentage of the total work.

the kind of rate increase authorized under Section 15a(4) (see App. B, 45b). In *Long Island R.R. Co.* v. *United States*, 388 F.Supp. 943 (E.D.N.Y. 1974) (App. D)), a three-judge court held that under Section 15a(4)(b) governing *interim* increases, the Commission had no power to prevent a terminal surcharge from becoming effective pending a hearing and final determination (388 F. Supp. at 947) (App. D, 8d). But the court declined to express any view as to the propriety of the terminal surcharge under the very different provisions of subparagraph (4)(c), which requires that any rate increases comply with "the standards and limitations applicable to ratemaking generally," stating (*id.*):

> "[W]e express no view with respect to its propriety as a final solution to the problem of recovering increased costs. ... [Section 15a(4)(c)] on its face appears to contemplate the consideration of more factors than are appropriate under the interim measures of Section 15a(4)(b).

Long Island was thus permitted to file its tariff setting forth a "terminal surcharge" on an interim basis.

The Commission held hearings as required by Section 15a(4)(c) and, following its consideration of the submissions of all parties, made its "final rate determination" in which it approved Long Island's terminal surcharge. The Commission did not make findings justifying the terminal surcharge under the "standards and limitations applicable to ratemaking generally," as required by Section 15a(4)(c). The Commission acknowledged that the terminal surcharge could not be justified by reason of any special service accorded the freight shipper, because it was undisputed that Long Island provided no special terminal service (App. B, 55b). Nor could the terminal surcharge applied to freight rates be justified by costs incurred in handling freight traffic, because 90 percent



of Long Island's increased retirement tax costs were attributable to commuter rather than freight service.[7] Whether any part of these commuter costs could or should be borne by commuters was a question not considered by the Commission but, rather, was regarded as a question for the "managerial discretion" of the MTA, the agency of the State of New York which operates Long Island (App. B, 56b). The Commission treated its responsibility solely as that of "determining the amount of revenue needed" to offset Long Island's retirement tax costs (App. B, 57b). The Commission did not even discuss, much less make findings with respect to, prior Commission rulings that commuter costs should not be imposed on freight operations (in the form of a terminal surcharge or otherwise) under the "standards and limitations" of ratemaking under the Interstate Commerce Act.

The Commission also made no findings as to whether a change in the divisions of the railroads participating in movements to or from Long Island was justified, although it is uncontroverted that under Section 15(6) of the Act, the Commission may not prescribe a change in divisions except upon a finding that the existing divisions are "unjust, unreasonable, inequitable or unduly preferential or prejudicial" (49 U.S.C. §15(6)) (App. G, 14g). The Commission is em-

---

[7]The Commission found that in 1972, of Long Island's total revenue of $94.3 million, "only about $9.2 million was derived from freight service." (App. B, 51b). Thus, over 90 percent of Long Island's revenue was derived from commuter operations. Of Long Island's 7,177 total employees, 808 were freight employees and 6,369 (89 percent) were passenger employees (Long Island Exhibit No. 4, Ex Parte No. 299, Sub-No. 1, page 3).

The Commission made no finding as to whether the pension costs incurred by Long Island attributable to Long Island commuter employees under the Railroad Retirement Act were any higher than the pension costs incurred by MTA with respect to its subway or other commuter employees not covered by the Railroad Retirement Act.

powered under Section 15(6) to change divisions only after giving consideration to the relative efficiency of the participating carriers, their revenue requirements, their costs, and other factors. The Commission in this case did not make any finding that the present equal-factor basis of divisions is unjust or unreasonable, and it did not consider any of the factors set forth in Section 15(6), on the theory that such a finding did not have to be made and that such factors did not need to be considered, because the Commission regarded the surcharge as not a part of the joint rate (App. B, 59b). However, the Commission conceded that the terminal surcharge "does not cover any service or privilege to the shipper" (App. B, 55b).

Three Commissioners dissented on the ground that the Commission's decision would disrupt the rate structure and unlawfully change the applicable divisions without making the findings required by Section 15a(4)(c) and Section 15(6) (App. B, 66b, 71b).

By order dated November 23, 1976, the Commission denied a petition for reconsideration and ordered other railroads to incorporate Long Island's 12.5 percent surcharge into their tariffs (App. C, 1c). Three Commissioners again dissented (App. C, 2c, 4c).

**The Decision of the Court of Appeals**

Railroads other than Long Island instituted review proceedings in the Court of Appeals for the Fifth Circuit. The Commission and Long Island filed briefs in support of the Commission's order. The United States, a statutory respondent (28 U.S.C. §2322), did not attempt to defend the Commission's order.

The Court of Appeals set aside the Commission's order and remanded the case to the Commission (App. A, 16a). The Court did *not* hold that as a matter of law under Section



15a(4)(c) the Commission either could or could not approve a terminal surcharge in the absence of terminal service, or that it could or could not impose commuter costs on freight shippers, and the Court did not reach the issues of whether such rate practices were or were not consistent with the "standards and limitations" applicable to ratemaking (49 U.S.C. §15a(4)(c)). The Court of Appeals held instead that it was "unnecessary" to reach such issues because the Commission failed to give "a reasoned explanation" of its order (App. A, 12a):

> "We cannot read the ICC's report as a reasoned compliance with the statutory mandate. Indeed the ICC's counsel in arguing the case at our bar admitted that the Commission had not made findings specifically responsive to that mandate."

"Illustrative of the deficiencies" in the Commission's report was the Commission's statement that it would rely on the "managerial discretion" of Long Island as to whether all or part of the commuter costs could or should be allocated to interstate freight service (App. A, 12a-13a). The Court of Appeals observed that, as the Commission itself had recognized, such an allocation ordinarily "is not a matter of managerial discretion" of the railroad, and that, "[u]nder the standards and limitations applicable to ratemaking generally, each service is usually required to bear its own costs" (App. A, 13a). The Court of Appeals held that the Commission's report "does not in specific language explicitly interpret the Act" (App. A, 13a), and that findings are lacking which would "support the ICC in making its final determination to accept an exercise of managerial discretion which provides that *all* the increases in railroad retirement taxes shall be borne exclusively by increases in interstate freight rates" (App. A, 13a).

The Court of Appeals also ruled that "another ground" for setting aside the Commission's order was the absence of any findings supporting a modification of the equal factor

basis of divisions (App. A, 14a-15a). The Commission had conceded that no such findings were made, but contended that such findings were not necessary because the terminal surcharge "was an 'add-on' and not a modification of the joint rates" (App. A, 15a). The Court of Appeals ruled that this reasoning was "totally unrealistic," because the surcharge changed the railroads' shares of the joint revenues produced by their joint service (*id.*). The Court of Appeals did *not* hold that the Commission could not change divisions because of the increased retirement tax costs incurred under the 1973 Act; it held rather that the Commission had not even attempted to make the findings required by Section 15(6) of the Act before the Commission could order any change in divisions (*id.*).

The Court of Appeals thereupon remanded the case to the Commission for further proceedings in conformity with its opinion. In so doing, it imposed no procedural requirements or restrictions upon the Commission. Pending the outcome of the reopened Commission proceeding, however, the Court of Appeals provided for the protection of the rights of all parties by permitting Long Island to continue to collect the "terminal surcharge" with the proceeds of the surcharge to be kept in a separate trust fund and made "subject to further just and equitable orders of the Interstate Commerce Commission" (App. A, 16a).[8]

Long Island filed a petition for certiorari on April 24, 1978. The United States, which was a statutory respondent below but which did not defend the Commission's order in the Court of Appeals, has not filed a petition for certiorari. Nor has the Commission filed a petition for certiorari.

[8]This Court, by order of March 6, 1978, granted a stay of the judgment of the Court of Appeals insofar as it required Long Island to keep the surcharge proceeds in a trust fund pending disposition of petition for certiorari (App. E, 1e).



## ARGUMENT

Long Island in its petition requests this Court to grant certiorari to review the Court of Appeals' decision setting aside the Commission's order. Alternatively, it requests this Court to grant certiorari and "summarily reverse" the Court of Appeals' order to the extent that it restored the surcharge subject to a trust fund requirement pending the outcome of the proceedings on remand (LI Petition, pp. 10–11, 20). These alternative requests should be denied.

First, the present case totally fails to satisfy the standards established by this Court for review on writ of certiorari. Rule 19 of the Rules of the Supreme Court states that certiorari will be granted "only where there are special and important reasons therefor," as "[w]here a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . . or has decided an important question of federal law which has not been, but should be, settled by this court." There is no conflict between the decision of the Court of Appeals below and that of any other court.[9] Nor, because the issues herein pertain to the interpretation of the 1973 Railroad Retirement Amendments under the unique and non-recurring circumstances of Long Island's "terminal surcharge", is any "im-

[9]There is no conflict between the Court of Appeals' imposition of a trust fund requirement upon the proceeds of the terminal surcharge which Long Island has been allowed to collect pending proceedings on remand before the Commission and the decision of the three-judge court in *Long Island R.R. Co.* v. *United States*, 388 F.Supp. 943 (E.D.N.Y. 1974) (App. D). As the three-judge court emphasized, it was concerned solely with the lawfulness of Long Island's terminal surcharge under Section 15a(4)(b) governing interim rate increases "[n]otwithstanding any other provision of law," and "express[ed] no view with respect to its propriety as a final solution to the problem of increased costs" under the entirely different standards of Section 15a(4)(c) applicable to the Commission's final rate determination, which was before the Court of Appeals.

portant question of federal law" involved, as is manifest from the refusal of the United States to defend the Commission's order in the Court of Appeals below and from the election of the United States and the Commission itself not to seek certiorari.

Moreover the Court of Appeals' decision setting aside the Commission's order for lack of reasoned findings as required by Section 15a(4)(c), and for having changed the participating railroads' divisions of joint rates without complying with Section 15(6), is clearly correct. Commission counsel admitted that the Commission had not made findings specifically responsive to the statutory mandate (App. A, 12a); and even Long Island now concedes that the Commission's order had the economic effect of altering existing divisions.

Finally, the Court of Appeals did not construe the "standards and limitations" provision of Section 15a(4)(c) in a restrictive fashion. Nor did it impose any procedural requirements or otherwise tie the Commission's hands during the proceedings on remand,[10] but left the Commission to exercise its judgment and discretion, and to carry out its responsibilities under the statute. Indeed, the Court of Appeals deferred to the Commission's discretion to a far greater extent than necessary. Rather than holding the terminal surcharge invalid as a matter of law (as railroad petitioners had urged), the Court below remanded the case for the Commission to make the necessary findings (App. A, 12a).

1. Long Island asserts that the Court of Appeals set aside the Commission's order because the Commission failed

[10]This is in marked contrast to *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, — U.S. —, 46 U.S.L.W. 4301 (April 3, 1978) (cited LI Petition, pp. 12n. 19, 17).



to determine whether Long Island's commuter service could bear its own costs or whether the State of New York should absorb such costs (LI Petition, p. 14). Long Island then contends that the court below erred both because Section 15a(4)(c) does not require such findings, and because the Commission made such findings (*id.*). The defects in Long Island's argument are three-fold: First, it misstates the basis of the Court of Appeals' decision. Second, it misconstrues Section 15a(4)(c) by totally ignoring the "standards and limitations" provision of that section. And third, it asserts that the Commission made findings which it did not in fact make.

The Court of Appeals' decision was not simply that the Commission had failed to determine whether Long Island's ratepayers, or its owner the State of New York, should pay any part of its increased retirement tax costs of commuter employees.[11] Railroad Respondents had argued that the Commission's order was contrary to the "standards and limitations" applicable to ratemaking (Section 15a(4)(c)) because it approved a terminal surcharge in the absence of any additional terminal service, and because it imposed the costs of local commuter operations on freight operations. Railroad Respondents also argued that the Commission had failed to give a reasoned explanation of its order in both these respects. The Court of Appeals agreed that the Commission had not provided a "reasoned explanation" of its order in either respect, and therefore did not reach the question whether a terminal surcharge could be imposed in the absence of special service, or whether local commuter costs could be imposed on freight shippers, under the "standards and limitations" of ratemaking (App. A, 12a). The issue was

[11]As its opinion makes clear, the Court regarded this as being merely "[i]llustrative of the deficiencies in the ICC report" (*supra*, p. 13).

therefore not limited to whether commuters or the State of New York could pay Long Island's increased commuter costs. It was, instead, whether the Commission had made its final determination as to the terminal surcharge by applying the "standards and limitations" of ratemaking and by making "findings specifically responsive to that mandate" (App. A, 12a). The court below held that the Commission had *not* made such findings, as Commission counsel admitted in argument (*id.*).

Long Island now claims that the Commission was not required to make such findings (LI Petition, p. 14). This claim is contrary to Section 15a(4)(c) and the Administrative Procedure Act. Section 15a(4)(c) specifies that the Commission "shall determine such final rates under the standards and limitations applicable to ratemaking generally" (App. G, 11g). Thus, Congress expressly provided that it was not enough that a proposed final rate increase cover increased retirement tax costs; any rate increase approved by the Commission "shall" be determined by the Commission in accordance with the "standards and limitations" of ratemaking generally. Long Island's argument that the Commission did not have to make findings showing that the rate finally determined complied with the "standards and limitations" of ratemaking totally ignores this express statutory requirement.[12]

Long Island also claims that the Commission did make the required findings (LI Petition, pp. 14, 15). Long Island's argument requires reading findings into the Commission's decision which are simply not there. The Commission's entire "discussion and conclusions" appears in Appendix B,

[12]Long Island's argument likewise ignores Section 8(b) of the Administrative Procedure Act (5 U.S.C. §557(c)), which requires that the agency decision include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . ."



51b–60b. No reference to the "standards and limitations" of ratemaking appears in the Commission's discussion, and no findings are made as to their application in this case.

The argument of Railroad Respondents that Long Island's terminal surcharge should not be approved in the absence of special terminal service was totally ignored by the Commission.[11]

The argument of Railroad Respondents that the terminal surcharge was improper because it would impose local commuter costs on freight operations (with the largest amount being imposed on operations farthest from Long Island) was brushed aside by the Commission with the observation that whether such increased commuter costs could or

[11]The Commission has long held that permanent surcharges will not be permitted except where the carrier provides terminal or other special service. *Passenger Fares and Surcharges*, 214 I.C.C. 174, 243 (1936); *Increased Freight Rates, 1951*, 281 I.C.C. 557, 638 (1951); *Surcharges, New York State*, 62 M.C.C. 117, 133 (1953); *Surcharge on Small Shipments within Central States*, 63 M.C.C. 157, 197 (1954); *Ex Parte No. 292—Increased Freight Rates and Charges, Southern and Western Railroads, 1973*, 344 I.C.C. 344, 346 (1973); *Ex Parte No. 311—Effect of Modifying Proclamation No. 3279 and Other Anticipated Energy Conservation Measures on the Operations of Carriers Subject to the Interstate Commerce Act*, 350 I.C.C. 563, 572 (1975).

In two cases, moreover, the Commission has flatly rejected efforts by Long Island to apply special surcharges in the absence of special terminal service. *Less Than Carload Handling Charge, Long Island Rail Road Company*, 308 I.C.C. 283, 288 (1959); *Car Turning Charges At Points on Long Island, N.Y.*, 332 I.C.C. 795, 799–800 (1969), *aff'd, Long Island R.R. Co.* v. *United States*, 307 F.Supp. 988 (E.D.N.Y. 1969). *See also Switch Connection Charge at Bethpage, N.Y., Long Island Railroad*, 355 I.C.C. 201, 210–215 (1977).

The Commission's failure to explain its departure from its own "prior norms" required that its order approving Long Island's terminal surcharge be set aside. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652–53 (1954); *Atchison, T. & S.F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 808 (1973).

should be borne by commuters through increased rates was "a question of managerial discretion more properly directed in the first instance to the MTA, which operates the Long Island" (App. B, 56b). The Commission's treatment of this issue was essentially that: (1) Long Island needs money to cover its increased commuter retirement tax costs; and (2) Long Island's management, the MTA, would prefer, in its "managerial discretion," to recover such revenues from freight traffic, especially that moving to and from points farthest from Long Island, rather than local commuters or taxpayers. This treatment was flatly contrary to the well-established ratemaking principle that (unlike the costs of intercity passenger service, which uses facilities in common with freight service) the costs of suburban commuter service are solely related to commuter service and should not be subsidized by freight operations—but instead should be borne by local commuters or be subsidized by governmental authorities.[14]

---

[14] *See Baltimore & O.R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 93–94 (1968); and *King* v. *United States*, 344 U.S. 254, 265 (1952). *See also Increased Railway Rates, Fares, and Charges, 1942*, 255 I.C.C. 357, 395 (1943); and *Penn Central Fare Revision—1969*, 335 I.C.C. 720, 724 (1970).

In *Chicago South Shore and South Bend Railroad Discontinuance of all Passenger Train Service* (Finance Docket No. 28322) (Order dated March 28, 1977), the Commission (Division 3) held that under "Federal policy on mass transit," any operating deficits not covered by Federal assistance are "to be made up either by the state or local communities involved" (Report, p. 49), the principle underlying this policy being that such deficits should be borne by appropriate governmental authorities and should *not* be imposed on freight operations. See also *Illinois Central R. Co. Suburban Fares, 1958*, 305 I.C.C. 221, 230 (1958), and *Illinois Central Gulf R. Co.—Electric Commuter Train Fares*, 351 I.C.C. 653, 665 (1976). In so holding, the Commission reaffirmed a standard of ratemaking to

*(footnote continued on next page)*



Long Island now attempts to defend the Commission's decision by pointing out that the Commission cited cases in which it had held that where intercity passenger service "inevitably and inescapably" cannot bear its own costs, then such passenger service deficits could be considered in determining the level of freight rates. This argument suffers from two fatal defects. One is that in the instant case, the Commission made *no* findings that Long Island commuters could not bear the burden of the increase in commuter costs resulting from the retirement tax increase, or that any such increases could not be subsidized by local governmental authorities. Thus, the Commission made no finding as to what the commuter fare level presently is, or how much such fares would have to be increased to cover the increased retirement taxes. Indeed, the Commission stated that it would *not* consider "[w]hether the passenger fare structure of the LIRR should bear some of this increased pension cost" because it incorrectly regarded this as "a question of managerial discretion more properly directed in the first instance to the MTA. . . " (App. B, 56b).

Moreover, as the Court of Appeals appointed out (App. A, 14a), the Commission completely failed to address itself to

---

which it had long adhered. Thus in *Multiple Fares in Chicago Area, Illinois*, 281 I.C.C. 537, 551 (1951), the Commission held that:

> "The fact that [petitioner's] suburban operations are largely separate and distinct is *all the more reason why they should stand on their own feet* and not lean for support on its interstate freight operations. See *Colorado* v. *United States*, 271 U.S. 153." (Emphasis supplied.)

And in *Railroad Passenger Train Deficit*, 306 I.C.C. 417, 483 (1959), the Commission again held:

> "That where the railroads are unable to operate a particular local or commuting service at a profit, and where such service is essential to the community or communities served, that steps be taken by State and local authorities, or both, to provide the service, paying the carrier the cost plus a reasonable profit."

the questions of whether, if commuter fares were not raised, the increased costs could or should be borne by Long Island's owner, the State of New York. The governmental authorities in New York, for their own reasons, have followed a practice of keeping suburban commuter rates low and making up any commuter deficits through subsidies. Since 1966, MTA has operated Long Island as a subsidiary corporation and has granted Long Island sufficient funds to make up Long Island's overall annual operating deficits. Such deficits have been incurred at the discretion of MTA, because that agency is empowered by statute to set fares at a level necessary to maintain itself and its subsidiary corporations on a self-sustaining level. N.Y. Publ. Auth. Law §1266(3). Long Island essentially concedes that no findings addressing this point were made by the Commission (LI Petition, p. 17).

In sum, no consideration whatever was given to the question as to whether Long Island commuters or the appropriate governmental authorities "inevitably and inescapably" could not bear Long Island's increased retirement tax costs.[15]

A separate fatal defect in Long Island's argument is that the cases cited by the Commission involved *intercity* pas-

[15]Long Island suggests that this defect is somehow cured by the Commission's finding that railroads other than Long Island had not excluded the increased retirement tax costs attributable to their commuter employees in computing the amount of their freight rate increases (LI Petition, p. 16). However, as Long Island expressly conceded before the Court of Appeals, whereas it is predominantly a commuter line, the commuter operations of other railroads are relatively insignificant (Brief May 9, 1977, p. 12, n.5): "Admittedly *unlike the LIRR*, the passenger operations of other railroads are a *minor item* when compared to their freight operations" (emphasis supplied). Moreover, as the Commission found, railroads other than Long Island deducted "subsidies from Amtrak, Metropolitan Transit Authority (MTA) and other public bodies" in computing their increased retirement tax costs (App. B, 56b).



senger service, which makes use of facilities in common with freight service. Because such common costs would have to be borne by freight shippers even if there were no intercity passenger service, it was at one time considered appropriate that interstate passenger deficits produced by such common costs be borne by freight operations. *See Baltimore & O. R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 93–94 (1968); *King* v. *United States*, 344 U.S. 254, 265 (1952). However, because suburban commuter service is for the most part distinct from freight service, there has never been any basis in law, Commission precedent, or common sense to impose the burden of commuter deficits on freight operations. The Commission's decision refers to *no* case in which the Commission has ever held, or even suggested, that solely-reiated suburban commuter deficits should be imposed on freight operations.[16]

Apart from its mischaracterization of the Commission's decision, Long Island further errs in suggesting that its 12.5 percent terminal surcharge should be upheld because Long Island had a *total* operating deficit of $108 million in 1974 (LI Petition, p. 16). This case is not about Long Island's total

[16]Under previous Commission policy and practice, although solely related suburban commuter costs were not imposed on freight operations in the form of higher freight rates (see authorities cited *supra*, pp. 20–21), there was a question as to whether *intercity* passenger service deficits should be imposed on freight shippers in the form of higher freight rates. Congress, in the Rail Passenger Service Act (45 U.S.C. §501 *et seq.*), resolved that question when it decided that intercity passenger service deficits should be subsidized by "Federal financial assistance" (Section 101) rather than freight operations, and created Amtrak to accomplish this purpose. The Commission's decision in the present case is thus particularly incongruous because it would for the first time place the burden of solely-related commuter costs on freight operations, even though Congress has now decided that even intercity passenger service deficits should be subsidized by the government in order to relieve freight operations of that burden.

passenger deficit, or whether that deficit should be made up by New York commuters or New York taxpayers. No one has proposed that the total deficit be borne by freight operations. The issue in this case is whether the $6 million in retirement tax increases, 90 percent of which was attributable to commuter service, should be borne entirely by freight operations. Long Island's "evidence" cited in its Petition (p. 16) as to its *total* passenger deficit and the amount of commuter fare increase needed to eliminate that total deficit was and is irrelevant to the question of who should bear the much smaller cost of the retirement tax increases for commuter employees.[17]

2. Long Island also argues that the Court of Appeals misapplied Section 15(6) governing divisions (LI Petition, p. 17 *et seq.*). In its brief to the Court of Appeals, Long Island argued that the Commission's order authorizing the terminal surcharge did not change the existing divisions (Brief May 9, 1977, pp. 27 *et seq.*). The Court of Appeals held that the terminal surcharge was a "modification of the joint rates" (rather than an "add-on") and therefore "in economic terms" changed the divisions of the joint rates (App. A, 15a). Long Island now concedes that the Commission's order did have "the economic effect of altering the division of total transportation charges" (LI Petition, p. 18).[18] Long Island argues,

[17]If Long Island would have to increase its commuter fares 100 percent to make up its total passenger deficit of $108 million (as claimed, LI Petition, p. 16), then only a 5 percent increase in fares would be needed to make up the increased retirement tax expenses for commuter employees. The Commission gave no consideration to whether such a relatively modest fare increase was either fair or feasible.

[18]Long Island leaves to a footnote the same "technical" argument here that the Court of Appeals rejected (LI Petition, p. 19, n. 33)—namely, that the terminal surcharge is not part of the joint rate, so that Long Island's retention of the surcharge does not alter

*(footnote continued on next page)*



however, that the Commission had authority under Section 15a(4)(c) to change the divisions without making the findings required under Section 15(6) (governing changes in divisions) (LI Petition, p. 18). This argument—which was *not* made to the Commission or to the Court of Appeals below—is unfounded. Nothing in Section 15a(4)(c) or any other part of the 1973 amendments to the Act authorized the Commission to modify existing divisions without complying with Section 15(6)—which by its terms applies to all Commission orders changing divisions (App. G, 14g).

The legislative history of Section 15a(4) to which Long Island refers (LI Petition, p. 18), shows that Congress contemplated that when the Commission determined what the final rates would be under Section 15a(4)(c), some carriers might not require as large a rate increase as others and some carriers might be able to offset increased retirement tax costs by other means.[19] Such "variability of application" was not precluded by the "standards and limitations" of rate making.[20]

the division of "that rate." However, in the very next sentence Long Island concedes that the joint service of all participating railroads, rather than any special terminal service by Long Island, is what produced the total rate paid by the shipper, *including* the surcharge. The Court of Appeals properly rejected the "technical" argument that the surcharge is not part of the joint revenue subject to divisions as "totally unrealistic" (App. A, 15a).

[19]Hence the Senate Committee concluded (S. Rep. No. 93-221, 93d Cong., 1st Sess. 3 (1973)):

> "While the present financial conditions of some carriers may justify 'pass through' of the expense increases, this may not be the case with all carriers. Prompt consideration of requests for rate increases is needed, but there is no demonstrated need that such increases must be automatically granted."

[20]Thus the Commission authorized a somewhat lower rate increase for traffic moving within the South than for traffic moving within the West and Northeast (App. B, 13b).

*Nothing* in the Act or in the legislative history of the 1973 amendments, however, even remotely suggests that Congress intended to authorize changes in the divisions of revenues among carriers without compliance with the requirements of Section 15(6). Certainly no such intention can be inferred from Congress' recognition of the fact that "Commission authorizations for rate increases 'do not . . . preclude variability of application. . . .'" S. Rep. No. 93–221, 93d Cong., 1st Sess. 3 (1973) [quoting *Ex Parte No. 281, Increased Freight Rates and Charges, 1972*, 341 I.C.C. 288 (1972)]. Indeed, it is totally inconsistent with Congress' recognition that some railroads might be able to offset increased retirement tax costs by other means and thus not require rate increases of the same magnitude as other railroads, to argue that every railroad must be permitted to offset the entirety of its increased retirement tax costs even if this would do violence to the "standards and limitations" set forth in the Interstate Commerce Act and to which Section 15a(4)(c) expressly requires adherence. As the Senate Committee stated, "'The public interest and the maintenance of a lawful rate structure must prevail over respondent's revenue need, however pressing.'" *Id.*

Long Island also suggests—again for the first time—that the Court of Appeals made "findings on the divisions point" which were somehow sufficient to meet the requirements of Section 15(6) (LI Petition, p. 19). Neither the Commission nor Long Island made any such argument before the Court of Appeals, and it is plainly wrong. None of the findings specifically required under Section 15(6) as to the existing divisions, or the relative efficiency of the railroads, of their costs or revenue needs, or the other matters which must be considered in a divisions proceeding, was made.



Southern and Western railroads are not asking anything inequitable (as Long Island contends, Petition, p. 19). They are not asking that they be "permitted to charge rates in excess of those needed to recover their retirement tax obligations" (*id.*). They are asking only to receive their established divisions of revenues on shipments to and from Long Island. The rates (including the surcharge) paid by shippers for service to or from points on Long Island are the same as the rates (without any surcharge) to adjacent points in New York (*supra*, p. 6). Under the Court of Appeals' decision, unless and until findings are made which would support a change in the applicable divisions, the Southern and Western railroads would receive the same divisions (both in percentages and in dollars) on Long Island shipments as on shipments to adjacent points in New York not located on Long Island. They would not have their shares of the joint revenue reduced by Long Island's taking what now amounts to an average division of 25 percent rather than the 16 percent to which it is entitled for its 2 percent of the service (*see supra*, p. 7).[21]

---

[21]Long Island's contention that it is pitted against railroads which are "most profitable" (LI Petition, p. 12) is wrong as well as irrelevant. Both the Commission and Congress have recognized that rates of return throughout the railroad industry have been dangerously low. *See, e.g.*, H.R. Rep. No. 94–725, 94th Cong., 1st Sess. 54 (1975)). *Ex parte No. 343—Nationwide Increased Freight Rates and Charges, 1977* (Order dated November 10, 1971, p. 11). *See also Ex parte No. 271—Net Investment—Railroad Rate Base and Rate of Return* (Report of the Coordinator), 345 I.C.C. 1494, 1565 (1976).

It would be directly contrary to stated Congressional policy to attempt to alleviate the problems of a railroad such as Long Island by requiring that its operations be subsidized by railroads elsewhere in the country which themselves are earning inadequate returns. Congress' response to the plight of the bankrupt Northeastern railroads such as Penn Central has been to create ConRail and to provide massive subsidies in an attempt to make it a prof-

*(footnote continued on next page)*

3. Long Island's petition asks that if this Court does not grant certiorari to review the Court of Appeals' decision, "in the alternative" it should issue the writ and "summarily reverse" that part of the Court of Appeals' decision imposing a trust fund on the surcharge revenues collected during the pendency of the remand proceedings.

Long Island's contention that it should be permitted to collect and use "interim" surcharge revenues at this stage of the proceedings is inappropriate because the Commission has made its "final determination" under Section 15a(4)(c),[22] and

---

itable concern. At the same time, Congress has sought to avoid similar railroad collapses in the South and West by relieving freight operations of the burden of intercity passenger deficits through the creation of Amtrak (*supra*, p. 23), and by instituting regulatory reforms in the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"):

> "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system so that this mode of transportation will remain viable in the private sector of the economy." 4-R Act §101 (45 U.S.C. §801).

*See also* 4-R Act Sections 202 and 205 (49 U.S.C. §§1(5), 15a(4)); and S. Rep. No. 94-499, 94th Cong., 1st Sess. 10-11 (1975).

[22]Long Island's contention that the Court of Appeals' imposition of a trust fund requirement somehow contravened the intention of Congress in its enactment of Section 15a(4)(b) and the decision of the three-judge district court in *Long Island R.R. Co.* v. *United States*, 388 F.Supp. 943 (E.D.N.Y. 1974) (App. D), construing the provisions of that section (LI Petition, pp. 9-10), has no relevance to the present situation. Section 15a(4)(b) was not before the Commission in the phase of the proceedings under the Railroad Retirement Amendments as to which judicial review was sought, nor was it before the Court of Appeals.

Moreover, Congress' intention in enacting the Railroad Retirement Amendments in 1973 that the railroads be provided with an

*(footnote continued on next page)*



the Court of Appeals has held that the surcharge unlawfully changes applicable divisions. If Long Island's request were granted, it would be able to continue to collect and spend divisions revenues which belong to other railroads.

The Court of Appeals could simply have set aside the Commission's order which it found to have been unlawfully entered. If the Court of Appeals had done so, Long Island would not have been permitted to continue to collect and spend the excess divisions it has been collecting but which belong to other railroads. There is no basis, therefore, for any contention that because the Court of Appeals allowed Long Island to continue to collect the surcharge pending the outcome of proceedings before the Commission on remand, the Court of Appeals could not properly require that the surcharge revenues be kept in a separate trust fund on the ground that it would be "equitable" to do so (App. A, 15a).

The trust fund requirement, imposed by the Court of Appeals as an integral part of its order in this case, preserves the positions of all parties—Long Island as well as the other railroads—during the remand proceedings before the Commission (at which time any remaining disputes as to the application of the existing divisions to the surcharge revenues may be resolved and the Commission can decide what rates should be collected in the future). The alternative to continuation of the surcharge subject to a trust fund is not to do away with the trust fund, but rather to set aside the surcharge.

---

expeditious means of recouping increased retirement tax costs on an interim basis under Section 15a(4)(b) "[n]otwithstanding any other provision of law" until final rate determinations could be made under the wholly different standards of Section 15a(4)(c) requiring compliance with the "standards and limitations" of rate-making, has no bearing whatever upon the situation now existing some 5 years later in which the Commission has made its final rate determination and in which that determination has been found by a reviewing court to have been unlawful.

## CONCLUSION

For the foregoing reasons, the alternative requests by Long Island for issuance of a writ of certiorari should be denied.

Respectfully submitted,

HOWARD J. TRIENENS
R. EDEN MARTIN
LAWRENCE A. MILLER
One First National Plaza
Chicago, Illinois 60603

*Attorneys for Respondents Aberdeen & Rockfish Railroad Company, et al.*

SIDLEY & AUSTIN
*Of Counsel*

May 24, 1978